Ordinance No. 42 of 1952) applied. In the course of his judgment, the learned Judge stated :—

"That section clearly applied for the prosecution was one for penalties under the Enactment and when the appellants claimed trial, as they did, the effect of their so doing was to put in dispute every material allegation in the charges against them including the allegations that the tobacco had been brought from outside Malaya, and that duty had not been paid on it. The effect of s. 99, then was that the proof of their side of these disputes was on the appellants, that is to say, they had to satisfy the court either that the tobacco had not been brought from outside Malaya or that the proper duty had been paid upon it."

With regard to the third point to be proved, the learned Judge referred to section 114(ii) of the 1936 Customs Enactment (which is practically the same as section 131(2) of the present Customs Ordinance) which read :—

"In any prosecution under this section any uncustomed goods shall be deemed to be uncustomed to the knowledge of the defendant unless the contrary be proved by such defendant."

and the learned Judge stated :

"The effect of that new sub-section clearly is that while knowledge that the goods were uncustomed remains an essential ingredient of the offence described by s. 114(1)(e), that ingredient is now in the first instance supplied by the law itself and it is for the accused person to displace it if he can."

The learned Judge then went on :—

"I pause here to emphasise a fundamental distinction between s. 99 and s. 114(ii) that may easily be overlooked. Both sections have the effect of shifting the onus of proof regarding certain facts from the prosecution on which it would otherwise lie to the accused. These facts, however, are very different. S. 99 applies to the fact that goods are customed or uncustomed whilst s. 114(ii) applies to the fact that the accused has or has not knowledge of the fact, which logically must have been already established, that the goods are uncustomed."

The learned Deputy further stated that, taking into consideration the presumption arising under sections 115 and 131(2) of the present Ordinance, the ingredients to be proved by the prosecution were proved and that a case was made out which, if unrebutted, would warrant a conviction, and that the defence of the respondents should have been called upon by the learned President.

Mr. Marshall in his reply stated that one of the ingredients of the charge that the goods were uncustomed had not been proved by the prosecution. "Uncustomed goods" were defined in section 2 of the present Ordinance as follows :—

"'Uncustomed goods' means goods in respect of which a breach of the provisions of this Ordinance or of any subsidiary legislation made thereunder has been committed."

and he stated that section 115 of the Ordinance only raises a presumption when a dispute has arisen in respect of the seven ingredients mentioned therein; in this case there was no such dispute; he could not agree with the reasoning of Thomson J. He did not think that the presumption under section 115 should arise as soon as a person is charged with being in possession of uncustomed goods, as at that time no dispute had arisen; however, if a presumption had arisen, then the evidence produced by the prosecution that some of the goods had marks and dates on them showing that, *prima facie,* they had been manufactured in Kuala Lumpur, Federation of Malaya, was sufficient to rebut such presumption.

Having considered this appeal and the grounds of judgment of the learned President of the Sessions Court, I have come to the conclusion that the learned President misdirected himself on the question of when the presumption under section 115 and section 131(2) arose.

In a case such as this, once the prosecution has proved that the respondents had conscious knowledge of the possession of the goods and were charged as this case, as soon as they claimed trial, the presumption under section 115 arose, as stated by Thomson J. in *Kee Kim Chooi & Ors. v. Public Prosecutor*[1]. It comes, therefore, to this that once it is presumed that duty has not been paid, there is a breach of the provisions of the Customs Ordinance 1952 and the goods *prima facie* become uncustomed goods, and the respondents charged under section 131(1)(e) are, by section 131(2) deemed to know that the uncustomed goods were in fact uncustomed and the onus of showing that they were not so is then on them.

I hold, therefore, that the learned President should have called on the respondents for their defence to the charge mentioned above.

The order of acquittal of the three respondents will be set aside and I order that this case be sent back to the learned President for him to call upon the respondents for their defence to the charge, the subject of this appeal.

Order accordingly.

Solicitors for the respondents : *Battenberg & Talma.*

INDO-AUSTRALIAN TRADING CO. LTD. v. HIN ANN HUAY & ORS.

[O. C. J. (Taylor, J.) June 21, 1954]

[Singapore — Suit No. 824 of 1952]

Landlord and tenant — Claim for possession — An association cannot hold tenancy in its own name.

The plaintiffs claim possession on the ground that the supposed tenancy is void. The defendant Association had obtained an assignment of the monthly tenancy with the assent of the previous landlord and had the tenancy registered in the Association's name. It was clear that

the supposed tenancy was void at law because the occupants had not the legal capacity to become tenants. The whole transaction therefore operated as an agreement to assign, and since under the Societies Ordinance the officers of the Society had power to contract the agreement was valid.

Held: applying the concurrent equitable jurisdiction of the Court the landlord's assent to the assignment should operate as an agreement to grant a tenancy to one or more suitable persons as trustees for the Association.

Case referred to:—

(1) *Jarrott v. Ackerley* (1915) 113 L.T. 371.

ACTION for possession.

L. A. J. Smith for the plaintiffs.

F. R. N. H. Massey for the defendants.

Cur. Adv. Vult.

Taylor, J. : — This is an action for possession of a very large building, at present used as a school.

The plaintiffs are a trading concern and have lately purchased the property. Whether they want it for their own occupation or for some other purpose does not appear.

The defendants are a society registered under the Societies Ordinance. One of their objects is to conduct a primary school for children of members. Before the war they had about fifty pupils. During the Japanese occupation the Society did not function. In 1945 it was revived and the committee sought accommodation for a new and larger school.

Early in 1946 they took over the property now in question. At that time it was owned by a bank, managed by their agents, the Estate & Trust Agencies Ltd., and let to one Tan Guan Koon, on a monthly tenancy at $100. The chairman of the Association, duly authorised by the committee of management, first negotiated with Tan who agreed to vacate in favour of the Society. On 17th January Tan informed the agents by letter that he had decided to transfer the tenancy to the Association and requested that the name in the rent receipt should be changed accordingly.

The agents referred this application to the bank; one of the officers of the bank wrote "approved" on the original letter. On 23rd January Tan and the chairman called at the agent's office. The manager took one of his company's standardised forms of transfer of tenancy and himself filled it in for them. Tan signed it in Chinese. The chairman affixed the seal of the Association and signed as chairman.

It is customary on letting in a new tenant to take a sum equal to one month's rent as a deposit and also one month's rent in advance. The chairman accordingly produced $200 in cash. The rent for January and Tan's original deposit were adjusted; the association were entered by their registered name as tenants in the agent's books with effect from 1st February and were credited with their deposit and the rent for February. Later rent was raised to $125 and it was paid regularly until the present dispute arose. Since then it has been tendered and refused.

A monthly tenancy is in law assignable, with, or in some cases even without, the assent of the landlord. It is clear that Tan wished to assign his tenancy to the Association for the purposes of a school, that the landlord assented in writing and that the agents completed the matter by recording it in their books in accordance with their usual practice. The officers of the association wanted the association to become the tenants in their collective name and the agents agreed to that and did their best to effect it. There was genuine *consensus ad idem*. There was a valid agreement in writing to let the building to the members of the association, regarded as a body. Unfortunately, none of the four persons concerned appreciated that such a body has not the capacity to hold a legal interest in land. It was an agreement to make an assignment which was incapable of taking legal effect in the manner intended. As a matter of conveyancing the assignment is void. The Association did not become legal tenant.

The management committee considered the matter at a meeting on 14th February but they were under the same misapprehension of law. The minutes are in Chinese and there was some doubt about the first translation but this was cleared up by the Senior Court Interpreter. The best translation is :—

"After a long discussion it was decided unanimously that it was most proper to rent these premises in the name of the Association."

That was unequivocal ratification by the committee of the assignment in the collective name.

Also the general body of members have ratified the transaction as a whole by their conduct in continuing to support the school but, inasmuch as they would not know the details, their ratification covers the agreement only and does not extend to the assignment.

The plaintiffs claim possession on the ground that the supposed tenancy is void. They rely on *Jarrott v. Ackerley*[1], but that case is clearly distinguishable on the facts because there the party who took the lease was not authorised by the society to take it.

The defendants put forward several alternative arguments.

First they said that the lettering to the Association by the collective name amounted in law to a letting to all the persons who were members at that date; every one of them became a joint tenant; such as have ceased

to be members on death or resignation ceased to be tenants; new members do not become tenants but the surviving member-tenants are trustees for themselves and all new members. This argument is founded on a supposed analogy with commercial partnership but the analogy fails because a partnership is, in law, dissolved on the death of a member whereas the association goes on. The suggested result is materially different from what was intended by the parties.

Next it was submitted that in law the letting was to the then committee as trustees for the association but the same objections apply.

It was also suggested that there was a letting to the then Chairman as sole trustee but he was never authorised to contract in that way.

Lastly it was contended that having deliberately assented to the assignment, given possession and accepted rent, the landlords are estopped from denying the validity of the tenancy. Estoppel arises on facts. The landlords never made any representation. They merely assented to a request by Tan. They never induced any erroneous belief. They simply adopted and acted on the erroneous belief of the other two parties. They are not estopped.

The supposed tenancy is void at law because the occupants have not the legal capacity to become tenants.

This is not to say that they have no capacity to contract. In some of the English cases a club has been referred to as non-existent. I think this refers only to the non-existence of a legal person capable of joinder in suit by an artificial name. One would not say that Lloyds or the London Stock Exchange are non-existent though neither can sue or be sued except by a real person in a representative capacity. Some of the old text writers thought that persons were of two kinds, natural and corporate. Nowadays there are at least six classes of persons, namely, corporations, firms, suable associations, non-suable associations, natural persons under partial disability and finally able persons, including sane, adult, solvent males and *femes sole*, and certain classes of married women.

The English cases on the contracts of clubs cannot be applied in this Colony, without qualification because we have a special statute, the Societies Ordinance (Cap. 217).

In the main it is a penal law but it contains a few provisions on the civil side. Counsel were not able to find any reported cases and I do not know of any written judgments though the liquidation section has often been applied and many schemes have been sanctioned by this Court.

A society can sue and be sued in the registered name and a judgment binds the property of the society. Section 20 expressly authorises payment of "the debts of the society" from the proceeds of such property. There are very few ways in which a society could incur a debt except as the result of some contract. By necessary implication from the words of the statute the officers of a society have some power to contract in the registered name and thereby to bind the property of the society.

The true analogy is with a statutory corporation. The management have power to contract in the corporate name and thereby to bind the corporate property; generally speaking they do not make themselves personally liable and they certainly cannot bind the individual members, who are a fluctuating body of persons. The powers may be extensive but they are always limited.

The Port of London Authority have tremendous assets and responsibilities but, they could not contract to build a wharf in Singapore, no matter how advantageous it might be for mutual trade. A commercial company may have wide powers to contract but they are limited both by the objects of their own constitution and by the statute under which they are incorporated. In particular, corporations cannot hold land except in so far as they are expressly authorised to do so.

As regards capacity to contract, the difference between a corporation and a registered society is a difference of degree and extent rather than a difference in kind. Neither can in fact contract except by the agency of some director or officer. Neither can validly contract unless the acts of the agent are *intra vires*. Their contracts are for the benefit of a fluctuating body of persons but bind only the joint property of the members. An association, whether corporate or unincorporated, is a person by virtue of the Interpretation Ordinance and, as regards capacity to contract, resembles natural persons, such an infants and married women, whose powers are limited as to the objects of the contract, or as to the property affected, or both. The latter are called persons under partial disability; the former may be called persons of limited capacity; the meaning is the same.

There is nothing unpractical or fictitious in the idea of letting a building to a Society. A landlord who takes a deposit and collects rent in advance is partly secured. Where he can sue in the registered name he can readily distrain and the furniture is additional security. A well established society with a responsible committee might be a more desirable tenant than a trading firm. These considerations may have

influenced the bank or their agents. However that may be they certainly contracted to grant a tenancy. The only defect is in the conveyancing aspect which is technical.

The plaintiffs rely on a purely legal point and the defendants have groped vainly for a purely legal answer. Both have failed to grasp the principles that law and equity are administered concurrently and that in case of conflict equity prevails.

An attempt to convey a legal interest in land to an infant operates as an agreement for valuable consideration to execute a settlement in his favour. Friendly and charitable societies can take leases in the names of trustees.

The association being, like an infant, a person under partial disability the same principle should apply and the landlords' assent to the assignment by Tan to the association should operate as an agreement to grant a tenancy to one or more suitable persons as trustees for the association. It would not be equitable to make an order to that effect without giving the plaintiffs an opportunity to adduce any equitable defences which may be available to them.

The real defendants are nine hundred children in primary class and their education ought not to be interrupted until all reasonable alternatives have been examined.

The titular defendants will therefore have liberty to amend their defence, if so advised, by counter-claiming for the equitable relief indicated and for any other equitable relief which they may be advised is available to them, subject to their paying into Court the amount of rent now in arrear, plus $125 for July.

If no amendment is made within 21 days the plaintiffs may move for judgment.

If some such amendment is made the plaintiffs may have 21 days to reply.

It may not be too late for some arrangement to be made by the parties so as to avoid further litigation and in this context the defendants will remember that those who seek equity must first do equity. Having regard to the description of the property the existing rent, $125, seems low. That may be a matter for the Rent Board, but there is much to be said in favour of a comprehensive settlement.

Order accordingly.

Solicitors for the plaintiffs: *Donaldson & Burkinshaw.*
Solicitors for the defendants: *Allen & Gledhill.*

In re ANTHARANIK SIMON.

[A. Cr. J. (Spenser Wilkinson, J.) June 28, 1954]

[Penang — Criminal Revision No. 28 of 1954]

Road Traffic — Motor Vehicles (Driving Offences) Proclamation, s. 3(1) — Motor Vehicles Third Party Risks Regulations, reg. 3(1) — Disqualification — Special grounds.

The accused was charged with employing a person who was not a holder of a driving licence to drive a motor car, and of permitting the vehicle to be driven without there being in force in relation to the use of the said vehicle a policy of insurance. The accused pleaded guilty and was convicted and fined $40 on the first charge and $75 on the second charge. No period of disqualification was imposed as it appeared that the accused was dependant on the use of his car for his livelihood.

Held, following **Whittal v. Kirby**(3) and **Public Prosecutor v. Karthiah**(2): the fact that the accused was dependant on his car for his livelihood is not a special circumstance entitling the Magistrate to dispense with the disqualification.

Cases referred to:—

(1) *Rex v. Lim Kian Soo* (1950) M.L.J. 181.
(2) *Public Prosecutor v. M. Karthiah* (1953) M.L.J. 52.
(3) *Whittal v. Kirby* (1947) 1 K.B. 194.
(4) *Knowler v. Rennison* (1947) 1 K.B. 488 at p. 496.
(5) *Reavy v. Young* (1949) 1 All E.R. 1102.
(6) *Jones v. English* (1951) 2 All E.R. 853.

CRIMINAL REVISION.

I. K. Meek for the accused.

Cur. Adv. Vult.

Spenser Wilkinson, J.: — The accused was charged with employing a person to drive a motor car who was not a holder of a driving licence, contrary to section 3(1) of the Motor Vehicles (Driving Offences) Proclamation, and also with permitting the vehicle to be driven without there being in force in relation to the use of the said vehicle a policy of insurance, contrary to Regulation 3(1) of the Motor Vehicles Third Party Risks Regulations.

The accused pleaded guilty and having been convicted on his plea was fined $40 on the first charge and $75 on the second charge. The following note by the Magistrate appears on the record:—

"Accused states he is occupied as a traveller by Messrs. Guthrie & Co. and travel by road. He is thus dependent on his car for his livelihood. No suspension ordered."

Mr. Meek who appeared on behalf of the accused on the hearing of the revision relied on the case of *Rex v. Lim Kian Soo*(1) as authority for the proposition that the question of disqualification is entirely discretionary in the Magistrate. Mr. Meek was apparently